Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-734

CITY OF IMPACT, DALLAS PERKINS, NANCY PERKINS, his wife, R. L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORP., TOM RODEN, and PINKIE'S, INC.,
Petitioners,

v.

EDGAR E. WHITWORTH, d/b/a DINKIE'S FOOD MART,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The Respondent has attempted to distinguish this petition from the important issues presented in *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976) *cert. granted* 430 U.S. 944 (1977) by characterizing the City of Impact as having certain "shortcomings as a city," an issue never raised in the courts below. These aspersions are evidentially based on the small size of the community and the nature of one

of its principal businesses. However, the Supreme Court of Texas has twice upheld the validity and sovereignty of the City of Impact in spite of such challenges. *Perkins v. Ingalsbee,* 347 S.W.2d 926 (Tex. 1961); *Perkins v. State,* 367 S.W.2d 140 (Tex. 1963). The City of Impact, as the courts below correctly assumed, stands in no different legal position than any other validly chartered municipal government.

If, as the Respondent further suggests, the importance of the issue presented in *City of Lafayette* is that so many cities operate municipal electric systems, then the issues raised by this petition are surely of greater importance since a far greater number of cities engage in zoning.

The potentially disruptive effect of the court of appeals' decision, as discussed in the petition, is neither imagined nor understated.

The Respondent has also oversimplified the nature of the legal questions which this case presents under *Parker v. Brown,* 317 U.S. 341 (1943) and subsequent decisions. Petitioners have argued in their petition that an inquiry into whether the state has "mandated" certain challenged acts is only necessary when private parties seek to characterize their private conduct as state action and not when, as here, all injury flows directly from the acts of a governmental unit. Even if such an inquiry is necessary when the acts of a political subdivision of the state are challenged, the petitioners would suggest that the state's regulatory and statutory scheme in this case provides the requisite mandate from the state. Through its comprehensive regulation of liquor sales and its express approval of zoning as one aspect of such regulation, the State of Texas, like the Arizona Supreme Court in

Bates v. State Bar of Arizona, ____U.S.____, 53 L.Ed.2d 810 (1977), has "clearly and affirmatively expressed" state policy and is the "real party in interest". The Respondent further argues that the City of Impact has placed itself within the coverage of the antitrust laws by becoming a "participant in a private conspiracy." In relying on this issue, which this court expressly left undecided in *Parker,* the Respondent raises important questions as to the meaning of this phrase and whether such a finding is a sufficient basis for the imposition of liability.

Whatever the proper result, the nature and extent of the exposure of city governments to federal antitrust liability remains a complex and undecided issue.

The Respondent has also emphasized the significance of another issue—whether by merely alleging a conspiracy between a governmental body and private parties, he may avoid the normal requirement of standing under Section 4 of the Clayton Act, 15 U.S.C. § 15, that the plaintiff be "injured in his business or property by reason of anything forbidden in the antitrust laws." The Respondent could not and cannot enter the liquor business on his tract of land because in 1961, before its purchase by the Respondent, the lot was zoned residential and State law will not permit the issuance of a liquor license for a location so zoned. TEXAS LIQUOR CONTROL ACT. V.A.T.S. Penal Auxiliary Laws, Art. 666-24, 667-10½. The Respondent has not been injured in his "business or property" because these unchallenged state statutes and the valid act of city government prohibit his entry into the business alleged to have been injured.

The Respondent's attempt to characterize the Petitioner's argument as "Catch-22" is meritless because of

the conceded validity of the zoning ordinance. Although he never sought a zoning variance or pursued any other remedies under state law, the Respondent's Original Complaint did, in addition to his antitrust allegations, contain a challenge to the ordinance under state statutory and constitutional law and federal constitutional law. However, in granting summary relief for the Petitioner, the district court held the ordinance to be valid. This holding was not challenged by the Respondent on appeal and the court of appeals assumed the ordinance's validity. Therefore, even if it were established that the Petitioner violated the antitrust laws as alleged, the zoning ordinance would remain valid and state law would continue to prohibit the Respondent from ever obtaining a liquor license for his residential lot until he can successfully engage in what the Respondent refers to as the "formalities" of asking for a zoning change through local procedures.

By permitting the Respondent to maintain an action for injury to a non-existent business—and one which can never come into existence by reason of state law—the court of appeals has redefined the concepts of causation and injury to "business or property" in a manner requiring consideration by this Court.

In summary, the issues presented by the instant petition are of paramount importance because they involve the extent of proper federal supervision over the valid legislative functions of local governments. Additionally, the decision of the court of appeals directly conflicts with the earlier decisions of this Court delineating the antitrust liability of governmental units and also contravenes tradi-

tional interpretations of the standing requirement of Section 4 of the Clayton Act.

Respectfully submitted,

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